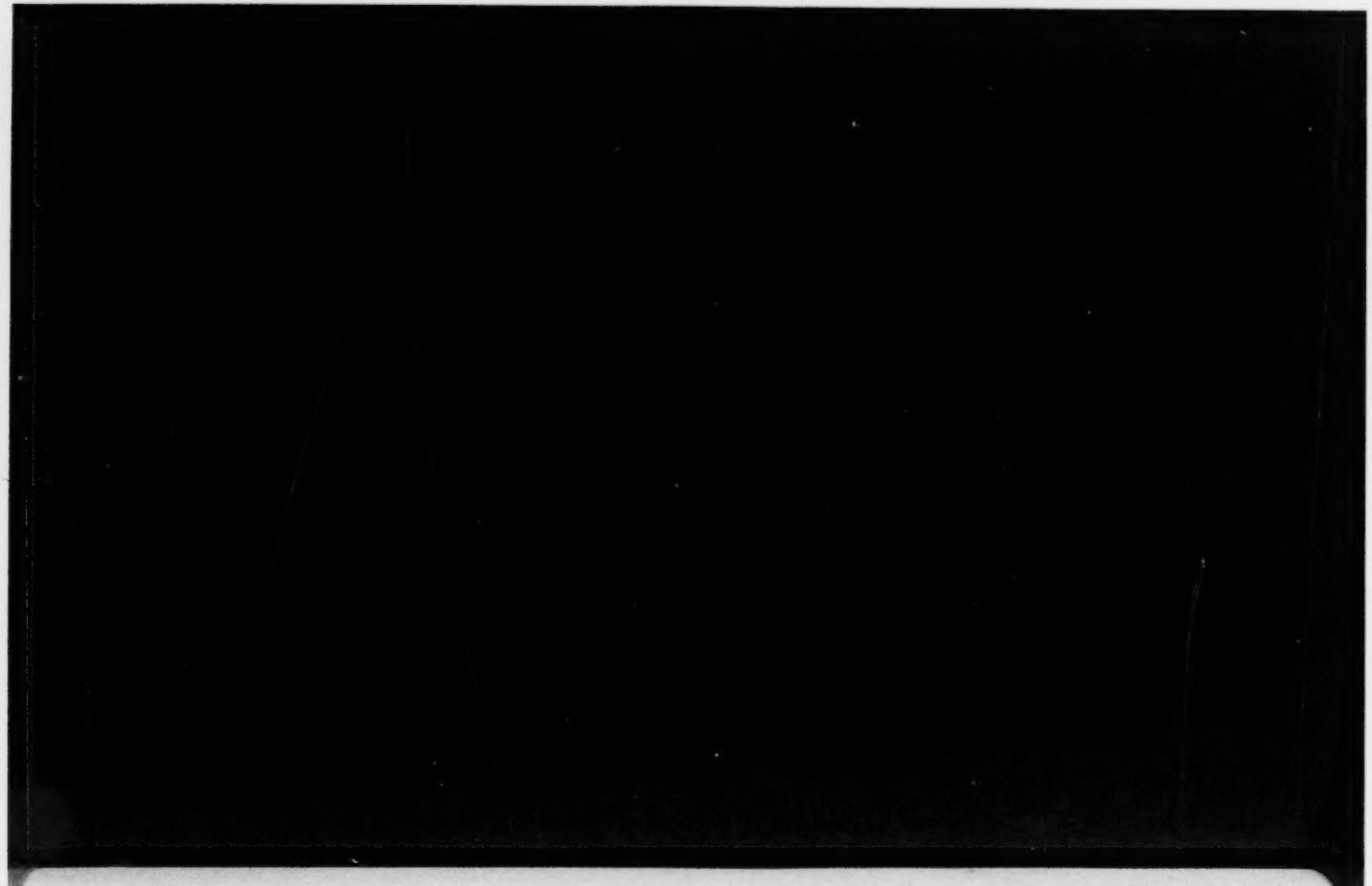

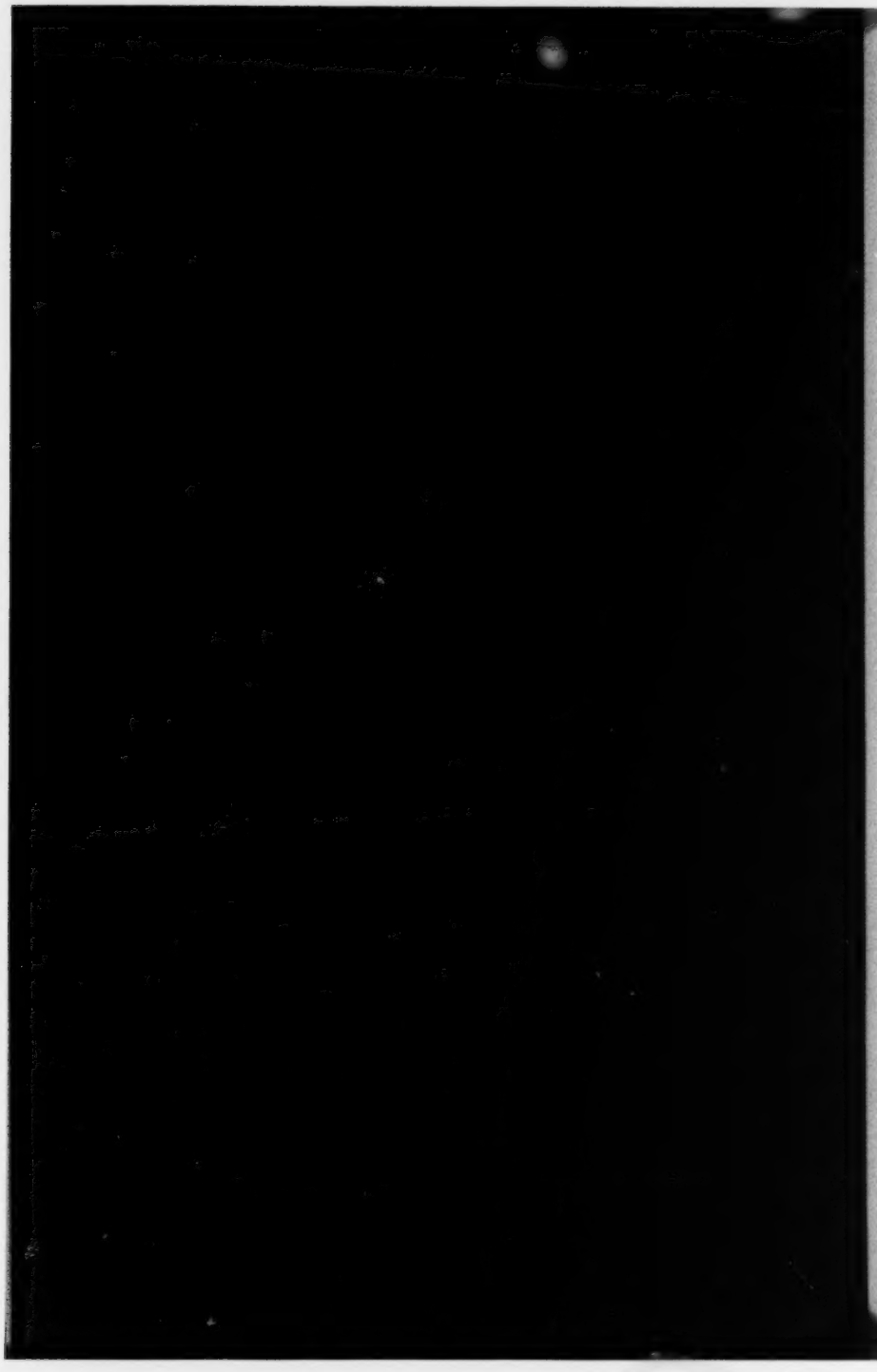

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421128—41

In the Supreme Court of the United States

OCTOBER TERM, 1941

No. 628

MCKESSON & ROBBINS, INC., MCKESSON-STEWART-HOLMES DRUG, AND BLUMAUER FRANK DRUG, DIVISIONS, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinions of the court below (R. 543–559) are reported in 121 F. (2d) 84. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 497–530) are reported in 19 N. L. R. B. 778.

JURISDICTION

The decree of the court below (R. 563–565) was entered on May 5, 1941. A petition for rehearing filed by petitioner (R. 585–597) was denied on June 21, 1941 (R. 598). The petition for a writ of certiorari was filed on September 20, 1941. The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

This petition is a companion to that in *Warehousemen's Union, Local 117, etc.* v. *National Labor Relations Board,* No. 627, this Term. It presents, phrased in various ways, questions 1 and 2 as stated in the Government's brief in opposition in that case, but not question 3.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (July 5, 1935, 49 Stat. 449, 5 U. S. C. Supp. V, Sec. 150 et seq.) are set forth in the Appendix to the Board's brief in opposition in No. 627, this Term.

STATEMENT

A statement of the proceedings before the Board and the court below, including a summary of the Board's findings of fact, conclusions of law, and order, with reference to the supporting evidence, appears in the Board's brief in opposition in No. 627.

ARGUMENT

Petitioner's major contentions, (1) that the Board and the court below erred in construing the Truce Agreement, and (2) that the Board was precluded by the election in the representation case from prosecuting the unfair labor practice proceeding, afford no occasion for review, for the reasons stated in our brief in opposition in No. 627. This brief in opposition will be limited to a discussion of certain subsidiary arguments urged by petitioner in connection with its major contentions.

1. Petitioner contends (Pet. 23–24, 28–30, 35, 43) that even if the Board and court below properly construed the Truce Agreement, discharges made in reliance upon it may not be held to be violative of the Act, "at least" until the Board has interpreted the agreement; and that, under the circumstances of this case, "a charge of unfair labor practices because of actions [under the agreement] cannot be sustained, but only an election ordered to determine the desires of the employees." Petitioner thus in effect urges that Section 8 (3) of the Act be construed to exempt employer discrimination carried out in reliance upon the supposed requirements of an agreement which is, in fact, inapplicable, unless the Board has previously adjudicated the inapplicability of the agreement. The statute clearly affords no such exemption. Cf. *National Labor Relations Board* v. *Star Publishing Co.*, 97 F. (2d) 465, 470

(C. C. A. 9); *McQuay-Norris Mfg. Co.* v. *National Labor Relations Board,* 116 F. (2d) 748, 752 (C. C. A. 7), certiorari denied, No. 862, last Term. Nor would an election such as petitioner urges serve any purpose since it would not be relevant in determining the Teamsters' majority status when the closed-shop agreements were made. Moreover, while the coercive effects of petitioner's conduct in enforcing the invalid closed-shop agreements are outstanding, the election cannot in any event demonstrate the free wishes of the employees (see our brief in opposition in No. 627, p. 11).

2. In an attempt to show that the Board's action in the representation proceeding under Section 9 constituted a determination of the issues raised by the charges in the unfair labor practice case under Section 10, petitioner argues (Pet. 33) that if the Board, in the representation proceeding, had believed that the closed-shop contracts were invalid it would, in addition to ordering an election, have ordered petitioner to cease "enforcement [of the contracts], and reinstate the employees in question." The argument completely misapprehends the distinction between proceedings under Section 9 and 10 and the nature of the issue in the representation proceeding (see our brief in opposition in No. 627, pp. 10–11). *Matter of Williams Manufacturing Co.,* 6 N. L. R. B. 135, which petitioner cites (Pet. 33), involved consolidated proceedings under both Section 9 and 10.

3. Petitioner contends (Pet. 20, 44) that the

Board's ruling that the discharges of the employees violated Section 8 (3) and (1) of the Act is in conflict with *National Labor Relations Board* v. *Sands Mfg. Co.*, 306 U. S. 332, holding that an employee may be discharged for repudiating his agreement. The contention erroneously assumes, contrary to the concurrent findings of the Board and court below, that the employees were bound by the Truce Agreement to join the Teamsters (see our brief in opposition in No. 627, pp. 13–14).[1]

CONCLUSION

It is respectfully submitted that the petition for a writ of certiorari should be denied.

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OCTOBER 1941.

[1] The same is true of petitioner's claim of conflict (Pet. 20, 36–44) with *National Labor Relations Board* v. *Electric Vacuum Cleaner Co., Inc.*, 120 F. (2d) 611 (C. C. A. 6), pending on petition for certiorari, No. 588, this Term; and *Peninsular & Occidental Steamship Co.* v. *National Labor Relations Board*, 98 F. (2d) 411 (C. C. A. 5), certiorari denied, 305 U. S. 653.

U. S. GOVERNMENT PRINTING OFFICE: 1941